

Before the
COPYRIGHT ARBITRATION ROYALTY PANEL
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

GENERAL COUNSEL
OF COPYRIGHT

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In the Matter of
ADJUSTMENT OF RATES FOR
NONCOMMERCIAL EDUCATIONAL
BROADCASTING COMPULSORY LICENSE

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) Docket No. 96-6 CARP NCBRA
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MOTION OF BROADCAST MUSIC, INC. TO COMPEL PRODUCTION FROM ASCAP

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Dated: November 13, 1997

CONTAINS ATTORNEYS' EYES ONLY AND
CONFIDENTIAL PROTECTED MATERIALS
SUBJECT TO THE PROTECTIVE ORDERS IN
DOCKET NO. 96-6 CARP NCBRA

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MOTION OF BROADCAST MUSIC, INC. TO COMPEL PRODUCTION FROM ASCAP

Broadcast Music, Inc. ("BMI") submits this motion to compel production of documents from the American Society of Composers, Authors and Publishers ("ASCAP"). By this motion, BMI seeks an order requiring ASCAP to produce to BMI all documents which ASCAP has already produced to the Public Broadcasting Service, National Public Radio and the Corporation For Public Broadcasting ("PBS/NPR/CPB"), but which ASCAP has refused to produce to BMI. BMI also seeks an order requiring ASCAP to produce to BMI all documents which ASCAP will produce in the future to PBS/NPR/CPB, not otherwise produced to BMI, including, but not limited to, documents produced by ASCAP pursuant to any order in connection with PBS/NPR/CPB's motion to compel against ASCAP.

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BMI notes that ASCAP has stated that it will produce certain documents responsive to BMI's initial document request on November 14, the same date as this Motion is to be filed. Therefore, BMI has not yet had the opportunity to review the documents produced by ASCAP. To the extent that a review indicates that ASCAP has not complied with the balance of BMI's initial document request, BMI renews its motion to compel production of documents from ASCAP which it made, in the alternative, on November 7.

BACKGROUND FACTS

On October 20, 1997, ASCAP produced to PBS/NPR/CPB documents underlying its written direct case in response to initial discovery requests served by PBS/NPR/CPB on ASCAP on October 8, 1997.

In BMI's initial document request to ASCAP, BMI asked ASCAP in Request No. 23 to provide to it, the documents produced by ASCAP to PBS/NPR/CPB.¹

On November 7, 1997, ASCAP responded to BMI's Request No. 23 by objecting on the grounds that ASCAP is not required to produce documents to BMI "merely because they may have been produced to other parties in this proceeding" and that the request is overbroad in that it

1. Although BMI originally sought in Request No. 23 documents produced by ASCAP to any "other party to this proceeding," it is amending this request and confining this motion to documents produced by ASCAP to PBS/NPR/CPB.

does not call for documents underlying a "specific factual assertion" made by a witness in the written testimony.²

On November 7, 1997, BMI filed the Motion of Broadcast Music, Inc. To Extend the Precontroversy Discovery Schedule Vis-à-Vis ASCAP. By that motion, BMI sought an order extending the discovery schedule with respect to BMI and ASCAP. In the alternative, BMI sought an order requiring that ASCAP be ordered to produce documents forthwith.

ASCAP has yet to produce any documents to BMI.

ARGUMENT

BMI is entitled to the documents ASCAP has already produced to PBS/NPR/CPB. There is no doubt that these documents underlie ASCAP's written testimony and exhibits, otherwise ASCAP would not have produced them to PBS/NPR/CPB. See 37 C.F.R. § 251.45 (c)(1) ("parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.").

The fact that ASCAP has already produced these documents to PBS/NPR/CPB negates ASCAP's objections. Thus, BMI's request is not "overbroad" because ASCAP has already gathered and produced the very documents BMI has called for. Similarly, the documents sought do underlie a "specific factual assertion" made by a witness, otherwise ASCAP would not have produced them to PBS/NPR/CPB.

2. ASCAP's response to BMI's document Request No. 23 is attached hereto as Exhibit A.

Moreover, it is simply improper for ASCAP to withhold from BMI documents it has produced PBS/NPR/CPB. BMI is entitled to the documents ASCAP has produced to PBS/NPR/CPB as a matter of fundamental fairness. In *Beiny v. Wynard*, 129 A.D.2d 126, 137, 517 N.Y.S.2d 474, 484 (1st Dept. 1987), a law firm, Sullivan & Cromwell, which had obtained documents from a non-party without having given notice to the adverse parties was disqualified as counsel from case in order to assure "fairness of the proceeding." See also *Wilk v. American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1980) (holding that party intervening in suit had right to use material already discovered by plaintiffs from defendants). Here, as a matter of fairness, ASCAP should not be permitted to produce documents that it admits underlie its case to PBS/NPR/CPB, but withhold those same documents from BMI.

In this regard, it is worth noting that on October 8, 1997, BMI served a document request on PBS/NPR/CPB, asking PBS/NPR/CPB to provide all documents produced to ASCAP. In response, PBS/NPR/CPB produced to BMI documents it had produced to ASCAP. BMI, moreover, is willing to produce to ASCAP's counsel, subject to the additional layer of confidentiality protection BMI has negotiated with ASCAP, all of the documents which it has produced to PBS/NPR/CPB thus far.

In addition, for the reasons set forth above, ASCAP should also be required to produce to BMI all documents it may produce in the future to PBS/NPR/CPB, including, but not limited to, documents ASCAP is required to produce to PBS/NPR/CPR as a result of any order by the Copyright Office entered in connection with the Motion by PBS/NPR/CPB to Compel Production From ASCAP.

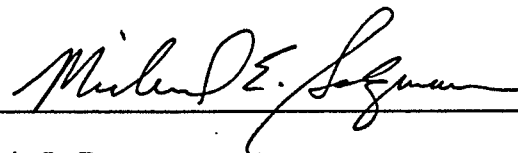
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CONCLUSION

For the foregoing reasons, BMI respectfully requests that the Copyright Office order ASCAP to produce to BMI the documents it has produced, and will produce in the future, to PBS/NPR/CPB, and to produce the other documents BMI has requested from ASCAP in its request for the production of documents in the event that ASCAP fails to do so on November 14.

Dated: November 13, 1997

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Sherri N. Duitz, an attorney, hereby certify that I caused a copy of the foregoing motion of Broadcast Music, Inc. to compel production from ASCAP in the Matter of Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, before the Copyright Arbitration Royalty Panel, United States Copyright Office, Library of Congress, to be delivered by overnight federal express on this 14th day of November, 1997 on each of the parties listed on the attached service list.

Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on November 14, 1997.



Sherri N. Duitz

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Docket No. 96-6 CARP NCBRA

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